No. 82-195

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FILED
APR 11 1983
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VAN D. MUELLER and JUNE E. NOYES,

Petitioners,

—v.—

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN and DOROTHY DEHAAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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I. MINNESOTA'S ATTEMPT TO PERMIT PARENTS TO DEDUCT ORDINARY TUITION PAYMENTS WHICH, AS A MATTER OF MINNESOTA LAW, MAY BE INCURRED SOLELY BY PARENTS OF CHILDREN IN PRIVATE SCHOOLS IS NOT "NEUTRAL" WITHIN THE MEANING OF THE ESTABLISHMENT CLAUSE

Respondents argue that Minnesota's decision to permit parents of children attending sectarian private schools to reduce their state income tax payments by deducting ordinary tuition payments to such schools in computing Minnesota taxable income does not violate the Establishment Clause because it is part of a "neutral" attempt to permit parents to deduct "educational expenses" in computing taxable income.

In fact, Minnesota has combined under the rubric "educational expenses" a number of expenditures, some of which may

be borne in common by parents of children in both public and private schools,[1] and some of which are -- as a matter of Minnesota law -- payable solely by parents of children in private schools,[2] 96 percent of whom attend a sectarian school. Petitioners believe that since the economic benefits generated by Minnesota's scheme flow disproportionately to the parents of children attending sectarian private schools, the entire statute is in violation of the Establishment Clause.[3]

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1. Driver's education fees and summer school tuition for non-required courses are the principal examples of such relatively trivial "common" expenses.

2. Ordinary tuition and the cost of curricular supplies are the principal examples of such purely private expenses. Minnesota law forbids the charging of tuition and fees for the ordinary public school curriculum. The sole exception is a de minimis category of children (totalling less then 100) who attend school out of their school district.

3. Respondent Allen's attempt in Appendices A and B of his brief to illustrate the
(Continued on following page)

At an absolute minimum, however, those educational expenses -- such as ordinary tuition -- which, as a matter of Minnesota law, may be incurred only by parents of children in overwhelmingly sectarian private schools, cannot be treated as "neutral" deductions, whatever the treatment of the "common" expenses might be. It is one thing to provide for the deductibility of an expense which may be incurred by the general public; it is quite another to permit the deduction of an expense which as a matter of Minnesota

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(Continued from previous page)
general availability of the deduction, in fact, demonstrates precisely the opposite. Respondent's figures demonstrate that in 1980 approximately 52.2 percent of returns claiming educational deductions accounted for only 11.6 percent of the dollar deductions. These relatively trivial "common" deductions were dramatically outweighed by far larger deductions for ordinary tuition which caused approximately 90 percent of the dollar deductions to be concentrated in fewer than half the returns.

law may be incurred only by parents of children in private, overwhelmingly sectarian, schools. Thus, whatever the constitutionality of Minnesota's scheme as applied to "common" expenses, the attempt to apply it to ordinary tuition expenses payable solely in connection with private schools which are overwhelmingly sectarian in nature cannot satisfy the neutrality principle which even respondents concede is critical to Establishment Clause analysis.[4]

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4. It is questionable whether, minus the ordinary tuition deduction which is its most significant feature, the Minnesota statute would generate any substantial economic benefit to parents of children attending sectarian schools. Where, as here, a clearly unconstitutional deduction is linked with lesser deductions of merely doubtful constitutionality, this Court may either invalidate the entire statute or invalidate the clearly unconstitutional deduction and remand for a hearing on severability.

II. MINNESOTA'S ATTEMPT TO PROVIDE A TAX DEDUCTION FOR FEES EXPENDED TO PURCHASE A RELIGIOUS SERVICE VIOLATES THE ESTABLISHMENT CLAUSE

Respondents argue that Walz v. Tax Comm'r, 397 U.S. 664 (1970), blasted a loophole in the Establishment Clause which permits the Minnesota legislature to subsidize the purchase of a religious service in the guise of an income tax deduction, despite the fact that all agree that an overt government payment to the religious institution or to the taxpayer would clearly violate the Establishment Clause. If respondents are correct in arguing that the government may award through the medium of tax forgiveness the very subsidy it is forbidden to award openly, the Establishment Clause will have been reduced

to a formalistic shadow. Indeed, if respondents are correct in arguing that the logic of Walz drains the Establishment Clause of real meaning, serious doubt must exist as to the correctness of the Walz decision.

It is, however, unnecessary to choose between the "benevolent neutrality" of Walz and the virtual repeal of the Establishment Clause urged by respondents. Where, as here, a taxpayer seeks to purchase an overtly religious service,[5] the grant of a tax deduction keyed to the payment of a fee for that service constitutes an obvious form of government subsidy of a

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5. This Court has repeatedly recognized that the basic purpose of a parochial primary or secondary school is the teaching and inculcation of religious values. Parochial school tuition is, therefore, a fee for the performance of a religious service.

specific religious activity.

It is true, of course, that other narrowly defined user fees -- such as medical expenses and interest deductions -- are singled out for favorable treatment by the Internal Revenue Code. Whenever the government targets a particular economic transaction and grants a tax benefit keyed to the payments of the user fees involved, the government subsidizes that transaction fully as much as if it made a direct payment to the participants. What differentiates medical deductions from parochial school tuition deductions is not the degree of subsidy -- each is a form of subsidy -- but the existence of the Establishment Clause which forbids government subsidies of religious activities. Thus, whatever the validity of Walz narrowly confined to its facts, it cannot be expanded to allow

government tax subsidies of the overtly religious decision to seek a parochial education for one's child without effecting the virtual repeal of the Establishment Clause and the sub silentio wholesale reversal of two generations of Establishment Clause jurisprudence.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the judgment of the Court of Appeals be reversed and Minn. Stat. § 290.09, Subd. 22, be declared invalid both on its face and as applied to ordinary tuition expenditures.

Respectfully submitted,

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